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In the Supreme Court of the United States

October Term, 1955

No. 768

DEAN LIAKAS,

Petitioner,

vs.

THE STATE OF NEBRASKA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA AND ENTRY OF APPEARANCE AS COUNSEL

EUGENE D. O'SULLIVAN,
One of the Attorneys for the Petitioner.

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PETITION FOR WRIT OF CERTIORARI

May It Please the Court:

The Petitioner, Dean Liakas, respectfully petitions this Honorable Court for a Writ of Certiorari to the Supreme Court of Nebraska.

1. The opinion of the Supreme Court of the State of Nebraska in this case is styled "Dean Liakas, Petitioner in Error vs. The State of Nebraska, Defendant in Error, Number 33733" in the records of said Court and is reported in Volume 161 at Page 130 of the official Nebraska Reports, and is also to be found in 72 N. W. 2d 677.

Said opinion is to be found also at pages 417 to 431 of the certified record herewith submitted and will also be appended hereto and designated as Exhibit 1.

2. The jurisdiction of this Court is invoked upon that part of Section 1 of Article 14 of the Amendments to the Constitution of the United States which in so far as is applicable provides "nor shall any state deprive any person of * * * liberty * * * without due process of law" and this matter is presentable to this Court under Section 1257 (3) of the United States Code Annotated.

(I.) The judgment sought to be reviewed was filed by the Nebraska Supreme Court on October 28th, 1955, and was also entered of record on said date.

(II.) On November 17, 1955, and within the time provided by Nebraska law, a Motion for a Rehearing was filed as well as a brief in support thereof, and upon request the Mandate of the Supreme Court of Nebraska was stayed until March 16, 1956 (R432-434). The Motion for a rehearing was argued orally and overruled on December 17, 1955, which was during the September 1955 term of the Court (R.435).

(III.) As aforestated the statutory provisions believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is Section 1257 (3) of the United States Code Annotated.

3. The questions presented for review are these:

(I.) Was it error for the Trial Court to give Instruction Number 9 which was as follows:

> "You are instructed that it is the law of the State of Nebraska that any witness in any case may

be asked on cross-examination as to his previous conviction of a felony, as was done in this case when the defendant, Dean Liakas, was being cross-examined. In this connection you are instructed that under the law of Nebraska any previous conviction of a felony may be considered by the jury for the sole and only purpose of affecting the credibility of Dean Liakas, the defendant in this case. Credibility is defined to mean the weight and credit the jury should give the testimony of such a witness—the worthiness of belief of such testimony, and in no way may be considered by the jury as proof of the crime charged in the Information. . . ."

This instruction in effect permitted the prosecution to submit to the jury the bad character of the defendant (previous convictions of felonies elicited on cross-examination) without the defendant having first put his character or reputation in issue.

The Nebraska law upon which the instruction was grounded, which will be cited hereafter, the eliciting of the previous convictions of felonies and finally the giving of the instruction amounted to a denial of due process of law as guaranteed to the defendant under Section 1 of Article 14 of the Amendments to the United States Constitution.

(II.) Was the failure on the part of the State of Nebraska to prove the possession and occupancy of a burglarized building in a criminal case by evidence beyond a reasonable doubt a denial to the defendant of due process of law as guaranteed to him under Section 1 of Article 14 of the Amendments to the Constitution of the United States?

The Criminal Information filed in this case alleged that the grocery store premises broken into was "leased and occupied by Ben Perelman, Robert Perelman and Harold Perelman, doing business as Ben Perelman Grocery." The State utterly failed to make proof of same. Both the Trial and Supreme Court held that that part of the Criminal Information did not have to be proved as laid.

(III.) Was it error to admit in evidence over defendant's objections, without any connecting or foundational evidence whatsoever, Exhibits 7, 8, 9, 10, 11 and 12, and each of same, and did the doing of same amount to a denial to the defendant of due process of law as guaranteed to him under that part of Section 1 of Article 14 of the Amendments to the United States Constitution which provides "nor shall any state deprive any person of • • • liberty • • • without due process of law"?

The Court admitted in evidence, over defendant's objections, six carpenter tools secured from among other tools from the trunk of an automobile the defendant had been driving, which was parked in the vicinity of the store which was broken into, said tools being known in the record in this case as Exhibits 7 to 12, inclusive, as follows:

Exhibit 7—Small Sledge Hammer.

Exhibit 8—Large Sledge Hammer.

Exhibit 9—Large Crow Bar.

Exhibit 10—Steel Punch.

Exhibit 11—Steel Chisel.

Exhibit 12—Small Crow Bar.

Pictures of these tools in lieu of the Exhibits themselves, by agreement of the parties are shown at page 63 of the certified record.

4. As aforestated, the constitutional and statutory provisions relied upon, are Section 1 of Article 14 of the Amendments to the United States Constitution which in so far as applicable provides "nor shall any state deprive any person of • • • liberty • • • without due process of law," and Section 1257 (3) of the United States Code Annotated permitting certiorari.

5. The following is a resume of the defendant's evidence:

———o———

When arraigned, Dean Liakas pleaded not guilty to the Information. He took the witness stand and testified in his own behalf. He stated that on the evening of May 29th, 1953, he went to the 7 Seas Cocktail Lounge, located at 1510 Harney Street, at about 9:30 P. M. and stayed there until May 30th at 1:10 A. M., never leaving the place during that period of time; that he drove a borrowed car owned by a friend, Bud Tyrell, down near the 7 Seas and when he returned for the car he had difficulty in starting it, but finally after getting the car started he drove down Leavenworth Street westward towards his home at 827 South 29th Street, which is a half a block South of Leavenworth Street; that the car motor sputtered and he had to stop it going up hill and couldn't get it in gear again and the car was finally parked a few feet from the corner of 35th and Jones Streets; that he used this car borrowed from George Bud Tyrell who

was called as a State's witness; that he had this car for a week or 10 days and used it to haul carpenter tools and nails and hardware he used in building himself a home near 76th and Cass Streets, Omaha, Nebraska; that in the trunk of the car were Exhibits 7, 8, 9, 10, 11 and 12, inclusive, and a large assortment of other modern day carpenter tools; that he explained the use he made of these Exhibits 7, 8, 9, 10, 11 and 12; that he had been and was employed as an upholsterer at the Blackstone Hotel for over a year working steady and on his off hours he worked as a carpenter building his own house and doing about 90% of the work on same; that he wanted to get the car repaired so it would run well enough to haul the carpenter tools and other items to the job next day so he passed his home and went out Leavenworth Street to the Motor Inn Garage at Turner Park and Leavenworth Streets, but it was closed; so he thought he would go to the Blackstone Garage, and as he was going North up 35th Avenue the car stopped at the top of the hill near where it was found by the police, a short distance east and north of the Perelman Grocery Store—practically a block—and close to Jones Street, the next Street north of Leavenworth Street; that he couldn't get the car started; that he tried to pry the gears so they would mesh with Exhibit 5, a small bar; that he went down 35th Avenue on the east side of the street afoot; that he went to the Cherry Garden Garage at 35th Avenue and Leavenworth Street on the south side of Leavenworth a distance of 2 blocks towards the west; that this garage was not open; that he then cut across 37th Street from the south to the north side of Leavenworth Street intending to go back to the car; that he

had about $400.00 on his person and carried the small pinch bar he had tried to start the car with him; that he walked from 37th and Leavenworth eastward on the north side of Leavenworth and was in front of the first house west of 36th Street about 1 block from the Perelman Store; that a car turned the corner of 35th Avenue with the brakes screeching and he saw a man run in front of it and another man running; then someone opened the door of this car and someone said, "There he is" and they jumped out of the car and ran towards him and he turned and ran to get into a house but could not and he continued to run across lots to the front of a house that had a light in it on 37th Street north of Leavenworth Street and ran in the yard where he was felled with a blow in the stomach area knocking the wind out of him and he fell to the ground face down; that after a couple of minutes a policeman came up, put his foot on his back and kicked him hard in the left side twice or more and used vile language towards him and commanded him to get up; that he was taken to a police car and later booked for the burglary of Perelman's store after he was struck by another officer at the police car at 37th and Leavenworth; that the men who pursued him and felled him afterwards turned out to be the three young men, Richard L. Reifschneider, James A. Moravec and Wayne A. Muenster who's testimony is at pages 123 to 220 of the record; that Liakas denied that he committed the burglary, was in the grocery store or fled from the store.

Robin Liakas, the wife of the defendant, testified, and corroborated the fact that they were building a house,

the cost of the house, and concerning its financing and sale, as to bruises on her husband's body when he was released from jail and other minor matters.

The witness Edward M. Ryan, Jr., testified as to Liakas' presence at the 7 Seas on the late evening and early morning of May 29th and 30th, 1953, and corroborated Liakas in other respects.

Bill Warren testified that he saw Liakas in the 7 Seas on the evening in question.

George Mahoney also corroborated Liakas by testifying that he saw him in the 7 Seas on the night in question until 20 minutes to 1 A. M. on May 30th when he, Mahoney, left the place.

Roy Chandler testified that he lived two doors away from where Liakas was building the house at 76th and Cass Streets, saw him doing carpenter and mason work on the house and helped him, Liakas, with the foundation work; that he, Liakas, had a set of carpenter tools which included Exhibits 5, 7, 8, 9, 10, 11 and 12 and explained their uses in building a house.

———o———

The following is a resume' of the State's evidence:

The State's witnesses, Police Officers Charles Reese and Robert F. Gentleman, discovered that the store had been broken into, and claimed they saw a man in the store and in spite of the darkness of the night and the dimmed lighting in the store identified him as Liakas. They say he threw a jug through the front window and ran out of the store, across a parking lot behind some

houses and crossed 36th Street to the west and ran between two houses where the three young men said he emerged between the 1st and 2nd house west of 36th Street where they and one of the officers, Reese, arrested Liakas; that Officer Reese testified that the man ran out of the store, was at all times closely pursued by him but he did not arrive at the place where Liakas was felled until a couple of minutes after the three young men had captured Liakas.

The police made an identification in spite of darkness and other obstacles. The State also put the witness, George Tyrell, on the stand, who was the owner of the car Liakas was driving and who was in the 7 Seas on the evenings when Liakas claimed he was and he corroborated Liakas' story in every particular, including the bad mechanical condition of the car.

The police could not start this car and had to pull it to the Police Station.

The back lid of the car lock was out of order and could not be opened readily according to the police.

Alvin Clinchard, a Captain of Police, testified that when interviewed at the Police Station Liakas *indicated* that *he* broke into Perelman's store. There was no stenographic report of any conversation, no reputed confession and no signed statement—just a vague hint at Liakas' guilt.

Captain Clinchard did testify that Liakas was building a house at 76th and Cass Streets; that the tools were primarily carpenter tools, and that Liakas was employed as an upholsterer at the Blackstone Hotel.

Harold Block of the Blackstone Garage testified that since 1949 no cars had been repaired at that garage but it had been used as a storage garage by General Motors.

6. The first stage in the proceedings in which the federal questions sought to be reviewed here were presented in the Nebraska Supreme Court in the brief of the plaintiff in error, and were also again presented in the Motion and Brief for Rehearing.

In the second and third paragraph of the opinion the Court says:

> "The first three assignments of error made by defendant relate to the giving of instruction No. 9 by the Trial Court on its own motion, the contention being that by the giving of this instruction the defendant was denied due process of law under Article I, Section 3, of the Constitution of the State of Nebraska and Section 1 of the 14th Amendment to the Constitution of the United States.
>
> "The defendant also assigns as error that the possession and occupancy of a burglarized building must be proved as charged by evidence beyond a reasonable doubt, and failure to do so amounts to a denial of due process of law to the defendant as guaranteed to him under the Constitution of the State of Nebraska and the Constitution of the United States."

The Court makes no mention of the admission of Exhibits 7 to 12, inclusive, in discussing their admissibility as being violative of the United States Constitution, but the Constitutional question was presented to the Court and argued and specifically referred to in detail in the Motion For A Rehearing.

In the brief, under the heading "Propositions of Law No. 5," we stated:

> It is error for the Court in a criminal case of burglary to receive in evidence standard mechanical tools which may be used to commit a burglary, unless they are found at the scene of the alleged offense and played or were about to play a part in the actual commission of the burglary which is being inquired into, or connected up by some evidence, to the offense under consideration, and to admit tools in evidence found in a closed compartment of a parked car, without any connecting testimony whatsoever, amounts to a denial of due process of law guaranteed to a defendant under Section 3 of Article 1 of the Bill of Rights of the Nebraska Constitution, and the applicable portions of Section 1 of Article 14 of the Amendments to the Constitution of the United States.

Why this matter was not ruled on specifically in the opinion as the other two were is a mystery to the writer.

In the Motion For A Rehearing our Assignment No. 5 was as follows:

> The Court erred in admitting in evidence over the defendant's objections Exhibits 7, 8, 9, 10, 11 and 12, and each of them, and that by reason thereof the Plaintiff in Error was denied due process of law as guaranteed to him under Section 3 of Article 1 of the Constitution of the State of Nebraska, which insofar as applicable provides "no person shall be deprived of • • • liberty • • • without due process of law," and is also violative of that part of Section 1 of Article 14 of the Amendments to the Constitution of the United States of America, which insofar as applicable provides "nor shall any state deprive any person of • • • liberty • • • without due process of law."

7. The Argument presented as to the giving of Instruction No. 9 and of its approval by the Supreme Court of Nebraska is the following:

As already stated Instruction No. 9 was:

> "You are instructed that it is the law of the State of Nebraska that any witness in any case may be asked on cross-examination as to his previous conviction of a felony, as was done in this case when the defendant, Dean Liakas, was being cross-examined. In this connection you are instructed that under the law of Nebraska any previous conviction of a felony may be considered by the jury for the sole and only purpose of affecting the credibility of Dean Liakas, the defendant in this case. Credibility is defined to mean the weight and credit the jury should give the testimony of such a witness—the worthiness of belief of such testimony, and in no way may be considered by the jury as proof of the crime charged in the Information."

The giving by the Court on its own Motion of Instruction No. 9 amounted to a denial of due process of law to the defendant, as guaranteed to him under Sections 3 and 12 of Article 1 of the Bill of Rights in the Nebraska Constitution, which insofar as applicable herein provide "no person shall be deprived of * * * liberty * * * without due process of law" and "no person shall be compelled to give evidence against himself. * * *"

The origin of the claimed right to cross-examine a defendant relative to whether or not he has been convicted previously of a felony stems from the passage of Section 25-1214 of the Revised Statutes of Nebraska, which is as follows:

> "Previous conviction of felony—how proved; A witness may be interrogated as to his previous conviction of a felony, but no other proof of such conviction is competent except the record thereof."

Our courts have held that this statute authorizes the asking of such a question of all witnesses, whether they appear in civil or criminal cases, and as to the number of times such convictions have been had.

Sulley vs. State, 119 Neb. 738, 230 N. W. 846.

The rule has been applied to a defendant in a criminal case as the following and other cases disclose:

Brown vs. State, 111 Neb. 486, 196 N. W. 926.

Vanderpool vs. State, 115 Neb. 94, 211 N. W. 605.

Shaffer vs. State, 124 Neb. 7, 244 N. W. 921.

This holding justifies such practice upon the theory that when a defendant submits himself as a witness he has no greater legal rights than any other witness.

There is, however, we think, a difference between a defendant as a witness and an ordinary witness in the case. He is more than a witness. He has constitutional and statutory rights which the ordinary witness does not have.

The following questions were asked the defendant, Dean Liakas, by the Deputy County Attorney, at page 286, lines 24 and 25 and page 287, lines 1 and 2, and were answered by the defendant:

Q. Mr. Liakas, have you ever been convicted of a felony?

A. Yes, sir.

Q. How many times?

A. Three.

In pursuance of the foregoing questioning Instruction Number 9 was given by the Court as follows:

"You are instructed that it is the law of the State of Nebraska that any witness in any case may be asked on cross-examination as to his previous conviction of a felony, as was done in this case when the defendant, Dean Liakas, was being cross-examined. In this connection you are instructed that under the law of Nebraska any previous conviction of a felony may be considered by the jury for the sole purpose of affecting the credibility of Dean Liakas, the defendant in this case. Credibility is defined to mean the weight and credit the jury should give the testimony of such a witness—the worthiness of belief of such testimony, and in no way may be considered by the jury as proof of the crime charged in the Information."

Although the questions aforementioned were not objected to, error was preserved as to the giving of this Instruction in paragraph 19 of the Motion for a New Trial (T19).

The error was also preserved in Paragraph 19 of the Petition in Error.

In view of the existence of the Habitual Criminal Act in this state it appears to us that Dean Liakas was required to give evidence against himself which could be used in the proof of an habitual criminal charge.

If Section 25-1214 of the Revised Statutes is held to apply to a defendant in a case such as this, and the previous cases decided by the Supreme Court are held to be proper in the premises, then this statute, aforementioned, and these Supreme Court cases, deny to this defendant his rights under Sections 3 and 12 of Article 1 of the Bill of Rights, in the Nebraska Constitution, which insofar as applicable to this case provide, that "no person shall be deprived of • • • liberty • • • without due process of

law," and "no person shall be compelled to give evidence against himself," and also amounts to a denial of due process of law, guaranteed to him under Section 1 of Article 14 of the Amendments to the United States Constitution which insofar as is applicable provides, "nor shall any State deprive any person of • • • liberty • • • without due process of law.

It is true that the attorney for the defendant requested the Court to give an instruction very similar to Instruction No. 9 given by the Court, and the State contended and the Nebraska Supreme Court held that this request by the defendant's attorney amounted to a waiver of the right to claim error in the giving of this instruction by the Court.

It is our claim that a Constitutional right in a matter such as this is never waived, and that the doings of an attorney for the defendant do not forever bar the assertion by or the granting to a defendant of a Constitutional right such as this.

8. The argument as to Point 2 relating to the possession and occupancy of a burglarized building in a criminal case is that same must be proved as charged by evidence beyond a reasonable doubt, and a failure to do so amounts to a denial to the defendant of due process of law as guaranteed to him under Section 3 of Article 1 of the Constitution of Nebraska, and Section 1 of Article 14 of the Amendments to the Constitution of the United States, heretofore quoted.

To support the allegations of rental and occupancy as pleaded in the Information, the only evidence was giv-

en by the witness, Ben Perelman (R., p. 2, lines 17 and 18) as follows:

"Q. Who runs the business there?

A. Myself and my son Robert."

No amendment was made of the Information or requested by the State.

In Instruction Number 2 (T9, 10), the Court stated that the building was occupied "by Ben Perelman and others doing business as Ben Perelman Grocery," and Instruction Number 5, in Paragraph 1, recites that one of the essential elements of the offense was that the building was occupied "by Ben Perelman and others, doing business as Ben Perelman Grocery."

The general tone of all of the Instructions in a criminal case is to the effect that all of the material allegations in the case must be proved by evidence beyond a reasonable doubt, before a conviction may be had legally and constitutionally.

Yet we find in the Nebraska case of *Sedlacek vs. State,* 147 Neb. 834, 25 N. W. (2d) 533, that our Court has stated that ownership, occupancy or possession of a building which has been burglarized is not essential. This may be true in a case where the ownership is unknown, but in that event it must be pleaded in the Information or Indictment, as the case may be, that such fact is unknown.

Certainly the law should not countenance a failure to prove such ownership, occupancy or possession or to prove it different than as alleged in the Information or Indictment.

Such an allegation is a material one—it is one of the vital elements of the alleged crime.

We therefore contend that the law announced in the case of *Sedlacek vs. State*, supra, is not sound law and is violative of the defendant's rights, and amounts to a denial of due process of law to the defendant, as guaranteed to him under Section 3 of Article 1 of the Bill of Rights in the Nebraska Constitution, which insofar as is applicable herein provides "no person shall be deprived of • • • liberty • • • without due process of law" and also amounts to a denial of due process of law as guaranteed to the defendant under that part of Section 1 of Article 14 of the Amendments to the Constitution of the United States of America, which insofar as applicable provides "nor shall any state deprive any person of • • • liberty • • • without due process of law."

9. The Assignment as to Point 3 relates to the claimed error of the Court in admitting in evidence over the defendant's objections Exhibits 7, 8, 9, 10, 11, and 12 and each of them.

There has developed in the law, in recent years, a rule holding that in a prosecution for burglary, once the fact of the burglary has been established in the evidence, any tools found in the possession of the defendant, capable of effecting entrance to the burglarized premises, are admissible in evidence against him, as establishing the fact that the defendant had the means to commit the crime charged.

An extensive annotation is found in Volume 143, A. L. R., on page 1199, which forms the basis for many of

the recent decisions relating to the above-stated proposition, and in particular for the decision of the Nebraska Court in the case of *Phillips vs. State,* 157 Neb. 419, 59 N. W. (2d) 598.

Many of the cases digested in the annotation relate to the possession by defendant of tools or devices, unique in nature, which are peculiarily adapted for blowing or burning safes or unlocking secured doors. It would be safe to assume that implements, such as dynamite caps, fuses, nitroglycerine, torches, skeleton keys, and the like, would not ordinarily be found in the tool chest of the average citizen.

In *Cornwall vs. State,* 91 Ga. 277, 18 S. E. 154, p. 1200 of the annotation, marble cutter's drills were found and introduced into evidence; in *State vs. Lynch,* 195 Iowa 560, 192 N. W. 423, p. 1200 of the annotation, two Presto tanks, one for oxygen, one for acetylene gas and a torch were found and introduced; in *State vs. Hoerr,* 88 Kan. 573, 129 P. 153, p. 1201 of the annotation, dynamite remnants out of which nitroglycerine had been extracted, a box of dynamite and a cap and fuse were admitted; and in *State vs. Clark,* 85 S. C. 273, 27 S. E. 300, in *McCoy vs. State,* 48 Tex. Crim. Rep. 30, 85 S. W. 1072, and in *State vs. Hill,* 46 Mont. 24, 126 P. 41, pp. 1201, 1202, and 1203, respectively of the annotation, skeleton keys capable of opening locked doors were found and admitted into evidence.

There is an apparent relevancy in the finding of specialized tools of the character set forth in the previously cited cases and the finding of a blown or burned safe on a burglarized premises, or the finding of skeleton

keys when entry to a premises had been effected by means of unlocking secured doors. Such implements would not be found in the possession of ordinary citizens, and the possession of such unique tools and devices by a defendant when like unique tools or devices had been feloniously employed to accomplish a burglary would provide a circumstantial link in the chain of evidence connecting the defendant to the crime.

Other cases digested in the annotation relate to the introduction and admission into evidence of common carpenter and masonry tools of a character and kind likely to be found in most homes in America. In what homes would there not be found hammers, chisels, tire irons, crowbars, pliers, and the like? And what particular relevancy would the fact of possession have upon establishing the guilt or innocence of the accused, unless it be shown that the tool or tools were used, or probably used, in gaining entrance to the burglarized premises?

It is different therefore from the situation in which specialized tools were found and similar specialized tools undoubtedly were employed. Any person who has been locked out of his own house knows that windows can be pried open with any kind of forcing agent. Sticks, pipes, shovels, brooms, screwdrivers, strong fingers and hands can be effectively employed as well as crowbars and other common tools. Unless it be shown that the tools found were those, or probably those, that were actually employed in gaining entrance to the premises, how could it be said that their possession by the defendant had any logical relation to the burglary? Or that the defendant would not be prejudiced by having every common tool

found in his possession exhibited before the jury and its burglarious possibilities learnedly discussed by police officers?

The fact situations detailed in some of the cases cited in the annotation permit the courts to hew to accepted rules relating to relevancy in admitting the tools found into evidence. In these cases the tools found and introduced were circumstantially shown to have been used in the perpetration of the offense charged. A proper foundation was thus established.

In *Perry vs. State* (1904 Tex. Crim. Rep.), 78 S. W. 513, found on page 1202 of the annotation the bit found was of the same size as the bit employed to gain the illegal entrance; and in *People vs. Larned,* 7 N. Y. 445, p. 1203 of the annotation, the tools were found to correspond to the markings on the doors of the bank and vault.

In the recent Nebraska case of *Sedlacek vs. State,* 147 Neb. 834, 25 N. W. (2d) 533, the following fact situation was presented to the Court and decided as follows; quoting from page 844 of the opinion, as found in the Nebraska reports:

> "Defendant complains of the admission of the iron bar in evidence on the ground that it was not properly identified. The sheriff testified that on the morning after the alleged offense, he went to the warehouse and found bar marks on the door; that he and another person looked for a tool that might have caused the marks; looked in defendant's car in front of the warehouse, found a bar, which fitted perfectly into the marks on the door, on the front cushion of the car; that the bar had since been in his possession and was in the same condition as when found. The

bar was admitted in evidence over objection as to foundation. *Subsequent thereto* a witness for the state testified that defendant's car was parked in front of the door to the warehouse; that he saw defendant go to his car, then go to the warehouse door with a bar and pry it open, take the bar back and put it in his car, and then enter the warehouse. *The exhibit went directly to the question of the breaking. Although we think that it would have been better practice to have withheld the offer until all the foundation was in,* it is patent that the admission of the exhibit in evidence was proper."

These cases are in accord with what an adherence to fundamentals would seem to require; that a foundational link of relevancy would necessarily have to be established between the tools and the crime before all or any part of them could be received in evidence.

In Wigmore on Evidence, Third Edition, Vol. 1, § 153, p. 600, the following is found:

"§ 153. Possession of Chattels as indicating other crimes than larceny.

"Wherever goods have been taken as a part of the criminal act, the fact of the subsequent possession is some indication that the possessor was the taker, and therefore the doer of the whole crime. Thus such possession is receivable to prove the commission of other acts than the simple crime of larceny. It is receivable to prove the commission of a burglary, a larceny, a counterfeiting, a murder, a liquorselling, or any other crime, in which a chief or subordinate result might be the possession of a material article. *For that same reason* the possession of burglary tools is relevant to show that the possessor committed burglary, *provided it first appears that the burglary was committed with such tools.*"

So also we find in *Sorenson vs. United States,* 168 F. 785, p. 1224 of the annotation, the following language, quoting from page 794 of the opinion:

> "If the articles found on the defendant had been traced to his possession prior to the burglary or theft, and there had been any evidence tending to show the presence of the defendant about the time of the trespass, and the like, the jury might have been advised that such possession of articles and implements, *if the evidence tended to show that they were probably used in executing the crime,* was a circumstance for their consideration."

The Court goes further and in one concise sentence states a truism in law, the overlooking of which has contributed to the breakdown of adherence to fundamentals in the other cases set forth in the annotation:

> "The ability to commit a crime does not evidence the act."

Many of the other cases set forth in the annotation disregard entirely that fundamental. They apparently hold that any tools, not connected directly or circumstantially by any evidence to the "break-in," can be introduced in evidence once the burglary is shown and the possession by the defendant of the tools is established. Therefore, evidence tending to show an ability to commit a crime evidences the act.

Such seems to be the ruling of the Court in *State vs. Phillips,* 157 Neb. 419, 59 N. W. (2d) 598, wherein the following language is found. Quoting from page 600 of the opinion as set out in the Northwestern Reporter:

> "The trial court admitted in evidence a large, bent screwdriver which was found in Donaldson's

car. There was evidence that the door to the service station had been 'jimmied.' The theory of the State was that Donaldson and the defendant were accomplices who were caught in the act of burglarizing the service station. Since the screwdriver found in Donaldson's car was a circumstance that might be considered against him, it was likewise admissible against the plaintiff in error. Where the evidence shows that a defendant was in the vicinity at the time a burglary was committed with the aid of burglarious tools, such possession may be admitted to show that defendant had the means to commit the offense in the manner that it was committed. It is a circumstance which the jury may consider. Also, when two persons are apprehended in the commission of a burglary, evidence of possession of burglarious tools by one is proper evidence against the other. 143 A. L. R. 1199 and cases therein cited. We find no error prejudicial to the defendant under the circumstances here existing."

This is a recent case and is not grounded upon any long line of previous decisions of the Court. It follows the departure from fundamentals that resulted in the other decisions cited in the annotation and its ruling should be reversed. It is respectfully submitted that the rule announced is too broad and can result only in present and future abuses. It allows evidence of the most damaging character to be introduced without any real showing of relevancy. In fact if followed in this case and similar cases it would allow evidence presumably irrelevant to be introduced.

Here, the tools found were all tools ordinarily used in the construction of a house. This was uncontradicted. Further, the defendant was actually engaged in building a house and in using the tools for that purpose. This

was uncontradicted. And it was never established in the evidence that the tools introduced, or any one or part of them fit or caused the marks found on the window jam at the burglarized store. Marks were found as is illustrated by the testimony of Sgt. Gallagher, a witness for the State. Quoting from his testimony as found on page 117 of the Bill of Exceptions commencing at line 20, and following:

Q. Officer, did you examine the window of the Ben Perelman store on the east side of the store towards the rear, next to the door, with particular reference to the one with the bars across it?

A. I did.

Q. And did you find any marks thereon?

A. I did.

Q. What kind of marks were they?

A. On the window frame or below the glass there were regular bar marks, *wide marks* made by a pinch bar of some kind.

The tools were in the possession of members of the Omaha Police Department from the time of the defendant's arrest to the time of the trial. The burglarized premises was available for their inspection from the time of the discovery of the "break-in" to the time of trial. Yet no evidence was introduced tending to establish that any of the tools found in the defendant's possession were used or fit the marks in the sill, which would establish that they could have been used, in gaining entrance to the building.

One foundational link was therefore missing in establishing the relevancy of the tools found in defendant's

possession. The means for establishing a proper foundation was within the power of the State. Their failure to produce the connecting testimony gives rise to a presumption that their relevancy could not be established.

The admission of the tools under the record in this case was error prejudicial to the rights of the defendant.

There is further prejudicial error in the record.

On the trial, the Court allowed the State's witnesses, Gallagher and Gates, to state their opinions as to how the various tools found could be successfully employed in imaginary burglaries. The defendant was not charged with the substantive crime of possession of burglar tools which is a separate and distinct offense from that of burglary.

To allow them to spray into the record page after page of opinion evidence relating only to proof of a separate offense than that charged was clearly improper, and the error clearly prejudicial.

Your petitioner respectfully submits to the Court that a Writ of Certiorari should issue out of the Supreme Court of the United States to the Supreme Court of Nebraska, taking jurisdiction of this case.

EUGENE D. O'SULLIVAN,

One of the Attorneys for Petitioner

The Clerk of the Supreme Court of the United States will please enter my appearance in the above entitled case as one of the Attorneys for the Petitioner herein.

EUGENE D. O'SULLIVAN,

278 Aquila Court Building,
Omaha 2, Nebraska.

APPENDIX

Exhibit 1

V.

LIAKAS — STATE

33733 — Filed October 28, 1955

1. Where a statute states the elements of a crime, it is generally sufficient, in an information or indictment, to describe such crime in the language of the statute.

2. If the information or indictment apprises the defendant with reasonable certainty of the accusation against him so that he may prepare his defense and plead the judgment as a bar to a subsequent prosecution for the same offense, it meets the fundamental purposes of an information or indictment, as well as constitutional requirements.

3. Under section 28-532, R. R. S. 1943, if the information for burglary sufficiently identifies the building allegedly entered, an allegation of ownership is not necessary in order that an offense under the statute be stated.

4. The statute providing that "A witness may be interrogated as to his previous conviction for a felony" does not limit the inquiry to a single conviction or prevent a proper inquiry as to the number of his convictions.

5. If a person accused of crime testifies in his own behalf he is to be treated as any other witness.

6. Error cannot be predicated on the refusal of the court to give a tendered instruction, where the court on

its own motion properly instructed the jury on the points covered by the instruction offered and refused.

7. Instructions are to be considered together to the end that they may be properly understood, and, when so construed, if as a whole they fairly state the law applicable to the evidence, error cannot be predicated on the giving of the same.

8. The credibility of witnesses and the weight of their testimony are for the jury to determine in a criminal case, and the conclusion of the jury will not be disturbed unless it is clearly wrong.

9. Where the accused is identified as having been at or near the scene of a crime about the time of its commission, evidence showing that he owned, possessed, or had access to any tools with which the crime was or might have been committed is admissible to show that the accused had the means to commit the offense in the manner that it was committed. It is a circumstance which the jury may consider.

Heard before Simmons, C. J., Carter, Messmore, Yeager, Chappell, Wenke, and Boslaugh, JJ.

MESSMORE, J.

In a prosecution by the State in the district court for Douglas County Dean Liakas was convicted of burglary, and for that felony was sentenced to serve a term of 8 years in the State Penitentiary. As plaintiff in error, defendant presents for review the record of his conviction. We hereafter refer to the plaintiff in error as defendant.

The first three assignments of error made by the defendant relate to the giving of instruction No. 9 by the trial court on its own motion, the contention being that by the giving of this instruction the defendant was denied due process of law under Article 1, section 3 of the Constitution of the State of Nebraska and section 1 of the Fourteenth Amendment to the Constitution of the United States.

The defendant also assigns as error that the possession and occupancy of a burglarized building must be proved as charged by evidence beyond a reasonable doubt, and failure to do so amounts to a denial of due process of law to the defendant as guaranteed to him under the Constitution of the State of Nebraska and the Constitution of the United States. The latter assignment of error will be discussed first, the first three assignments of error second, and other assignments of error as appear in the opinion.

The information, insofar as necessary to be considered here, charged: "• • • that on or about the 30th day of May • • • (1953) Dean Liakas • • • did willfully, maliciously, and forcibly, and with the intent to steal property of value, break and enter into a certain building located at 3552 Leavenworth Street, in the City of Omaha, in said county and state, which building is leased and occupied by Ben Perelman, Robert Perelman, and Harold Perelman, doing business as Ben Perelman Grocery, • • •."

To charge a statutory offense, the information or complaint must contain a distinct allegation of each essential element of the crime as defined by the law creating it,

either in the language of the statute or its equivalent. Dickens v. State, 139 Neb. 163, 296 N. W. 869; Sedlacek v. State, 147 Neb. 834, 25 N. W. 2d 533, 169 A. L. R. 868.

Where a statute states the elements of a crime, it is generally sufficient, in an information or indictment, to describe such crime in the language of the statute. Pandolfo v. State, 120 Neb. 616, 234 N. W. 483; Sedlacek v. State, *supra.*

If the information or indictment apprises the defendant with reasonable certainty of the accusation against him so that he may prepare his defense and plead the judgment as a bar to a subsequent prosecution for the same offense, it meets the fundamental purposes of an information or indictment, as well as constitutional requirements. Cowan v. State, 140 Neb. 837, 2 N. W. 2d 111; Sedlacek v. State, *supra.*

Under section 28-532, R. R. S. 1943, if the information for burglary sufficiently identifies the building allegedly entered, an allegation of ownership is not necessary in order that an offense under the statute be stated. Sedlacek v. State, *supra.*

The specific ownership of a building involved in a crime of burglary is not an essential element of the offense. An allegation of the ownership as such is immaterial save for the purpose of identifying the property, where the crime allegedly was committed, as not the property of the accused and to show that the defendant had no right to enter the premises. See Sedlacek v. State, *supra,* and cases cited therein.

With reference to the evidence on this subject, the witness Ben Perelman testified that he and his son Rob-

ert run the business; that the business was located at 3552 Leavenworth Street, on the northwest corner of Thirty-fifth Avenue and Leavenworth Street; that he occupied the whole building; and that there were things of value inside the store. In addition, this witness described the store as being 60 feet by 100 feet, with the east side facing Thirty-fifth Avenue and the west side facing a parking lot, and at the back there is an alley. He described the front or south part of the store, the nature of the construction, the glass and the entrance and other details relating to the premises. From a review of the evidence, the property is clearly identified, its occupancy and possession shown, and the disassociation of the right of the defendant to occupy the premises or to enter the premises at the time the alleged burglary was committed. This assignment of error cannot be sustained.

We next consider the first three assignments of error summarized above.

Section 25-1214, R. R. S. 1943, provides: "A witness may be interrogated as to his previous conviction for a felony, but no other proof of such conviction is competent except the record thereof."

The defendant asserts that there is a difference between the defendant as a witness and an ordinary witness for the reason that he is more than a witness and is possessed of certain constitutional and statutory rights which the ordinary witness does not have. On cross-examination the defendant was asked if he had been previously convicted of a felony. He answered "Yes, sir." And to the question, "How many times?" he answered

"Three." It is contended that the defendant was required to give evidence against himself which could be used in the proof of an habitual criminal charge.

In Brown v. State, 111 Neb. 486, 196 N. W. 926, it is said that by statute, a person charged with crime shall, at his own request, but not otherwise, be deemed a competent witness. "If he becomes a witness * * * he should be treated as any other witness. Heldt v. State, 20 Neb. 492; Comstock v. State, 14 Neb. 205, * * *."

In Sulley v. State, 119 Neb. 783, 230 N. W. 846, the court held: "The statute providing that 'a witness may be interrogated as to his previous conviction for a felony does not limit the inquiry to a single conviction or prevent a proper inquiry as to the number of his convictions."

This brings us to instruction No. 9 given by the trial court on its own motion as follows: "You are instructed that it is the law of the State of Nebraska that any witness in any case may be asked on cross-examination as to his previous conviction of a felony, as was done in this case when the defendant, Dean Liakas, was being cross-examined. In this connection you are instructed that under the law of Nebraska any previous conviction of a felony may be considered by the jury for the sole and only purpose of affecting the credibility of Dean Liakas, the defendant in this case. Credibility is defined to mean the weight and credit the jury should give the testimony of such a witness—the worthiness of belief of such testimony, and in no way may be considered by the jury as proof of the crime charged in the Information."

The defendant requested the following instruction No. 6 which was refused: "You are instructed that it is the law of the State of Nebraska that any witness in any case may be asked on cross-examination as to his previous conviction for a felony, as was done in this case, when Dean Liakas was being cross-examined, and in this connection you are instructed that under the law of Nebraska any previous conviction of a felony may be considered by the jury for the sole and only purpose of affecting the credibility of Dean Liakas, the defendant in this case, and you are further instructed that credibility is defined to mean, which means the weight and credit the jury should give the testimony of such a witness—the worthiness of belief of such testimony, and in no way may be used by the jury as proof of the substantive act charged in the Information."

Reviewing instruction No. 9 given by the trial court on its own motion and instruction No. 6 requested by the defendant, it is apparent that the instruction given by the trial court is substantially identical with the one requested by the defendant.

It is elementary that error cannot be predicated on the refusal of the court to give a tendered instruction, where the court on its own motion properly instructed the jury on the points covered by the instruction offered and refused. Jorgensen v. Robinson Seed Co., 112 Neb. 573, 199 N. W. 855. See, also, Peacock v. J. L. Brandeis & Sons, 157 Neb. 514, 60 N. W. 2d 643; Perrine v. Hokser, 158 Neb. 190, 62 N. W. 2d 677.

Instructions are to be considered together to the end that they may be properly understood, and, when so con-

strued, if as a whole they fairly state the law applicable to the evidence, error cannot be predicated on the giving of the same. Lovings v. State, 158 Neb. 134, 62 N. W. 2d 672, certiorari denied 348 U. S. 850, 75 S. C. 77, 99 L. Ed. 41.

The court did not err in giving instruction No. 9, as contended for by the defendant.

At the conclusion of all the evidence the defendant moved for a dismissal of the case, one of the reasons being the insufficiency of the evidence to prove the offense as charged.

In addition to the evidence heretofore set out, the record discloses that on the front of the building, facing south, there is about 30 feet of glass in three partitions, each being 11 feet high and 9 feet wide. The corner of the building is cut off, and a door which faces the southeast is the main entrance to the store. At the rear of the building there is a door that leads into the store where most of the deliveries are made. Across this door on the inside there is an iron grille. Next to this door is a window about 2½ feet by 5 feet, and there are iron bars across this window on the outside of the building. On the inside is a window screen which opens up and down. The screen was locked and all entrances to the building were securely locked at the time in question. The front of the store is lighted with neon advertising and other lights; there is a light inside the store; and Leavenworth Street is well lighted, making it easy to see inside of the store and to check the same.

At about 1:40 a.m., May 30, 1953, Officer Reese, and his partner, Officer Gentleman, were checking store build-

ings in the vicinity of Thirty-fifth Avenue and Leavenworth Street. Officer Gentleman was driving the car. They proceeded up Leavenworth Street and were using the spotlight on the car. In checking Perelman's store, Officer Reese saw a break in the window on the east side adjacent to the door of the store. The bars had been moved or pulled apart. He stepped out of the car, went toward the front of the building, leaned against the wall, and looked in through the door. At a distance of 20 feet he saw a man in the store look around the corner. He shouted to his partner that there was a man inside. The man darted back, and this officer headed toward the front of the store. He was running south along the east side of the building, approximately 10 feet from the corner, when he heard a crash and glass breaking. When he arrived at the corner, the glass was still scattering in the street. He rounded the corner on the south side of the store and saw a man running west on Leavenworth Street about 35 to 40 feet away. The officer yelled for the man to stop, then he ran after him. When the man reached the southwest corner of the Perelman store he angled off northwest across a parking lot beside the store, and when he reached the rear of the buildings on the east side of Thirty-sixth Street, the officer lost sight of him momentarily. He heard a horn honk on Thirty-sixth Street and the screeching of brakes, and saw a man spread in front of the lights of a car. The man was not struck by the automobile. He gave further pursuit of the man and could see that he had gone north and was angling toward Thirty-seventh Street. There was a group of boys who were also running north on Thirty-seventh Street. When the officer came around

the corner of the first house north of Leavenworth Street on Thirty-seventh Street, the man was lying on his face in a yard. The man had on one glove and was holding a glove and a steel punch in his hand. The gloves and steel punch, also referred to in the testimony as a pinch bar, were the property of the defendant. The officer handed his gun and the glove to one of the lads standing there, and pulled the man up. After the man was up he was evidently sick from running, and was taken back to the Perelman store. The officer identified the man as the defendant in this case.

Officer Gentleman corroborated the testimony of Officer Reese with reference to what Reese did in the immediate vicinity of the Perelman store. Officer Gentleman looked around the neighborhood for cars that might have been parked and which could have been used by the intruder. Across the street on the east side of Thirty-fifth Avenue, about 10 feet north of the Perelman store, he found a 1942 Ford sedan parked with the keys in the ignition. No one attempted to start this car, but it was towed to the police station. He found a kit of tools and a sack of money under the front seat of the car. He testified that there was a large break in the first window west of the main entrance to the store with an opening large enough to get through without difficulty.

A police sergeant arrived at the Perelman store and went through a hole in the plate glass window of the store. His examination disclosed that there were horizontal bars across the window on the east side, one of which had been pried and pulled downward leaving a method of entrance for a man to get through. The trunk

in the back of the car was not locked, but difficult to open. There was a box of carpenter tools in the trunk and some tools lying outside of the box which were selected, taken, and introduced in this case as exhibits and which will be discussed later in the opinion.

After the defendant was taken to police headquarters, at about 8 o'clock the next morning he was questioned by Captain Clinchard who testified that he questioned the defendant with reference to the circumstances surrounding a burglary of the Perelman store; that the defendant "indicated" to him that he had entered the store through the back part of it; that he had seen the officers when they arrived; that he grabbed a jug of wine and threw it through the front window; that he had the pinch bar when he was apprehended; and that it belonged to him, as well as the other tools. This officer took no statement, but made a memorandum as to what the defendant told him, and refreshed his memory from that. There was no objection to this testimony.

Officer Gallagher testified that the window adjacent to the door on the east side of Perelman's store, the small window with bars across the bottom half, had the middle bar pried clear down and the window had been forced up on the inside; and that on the window frame or below the glass there were regular bar marks, wide marks made by a pinch bar of some kind.

Ben Perelman testified that he received a call from the police that his store had been broken into. When he arrived at the store the front window was knocked out and glass was lying all over the sidewalk. The window on the east side of the building disclosed that the bars

were pulled open, one practically pulled out, and it looked like a bar of some kind had been stuck under it and pried up. The screen was pushed in, the glass was broken, and the lock on the window forced. He further testified that nothing was taken from the store, but a half gallon jug of wine was broken.

Three high school boys and their dates were in the vicinity of Thirty-fifth Avenue and Leavenworth Street at the time in question. The boy driving the car stopped at the traffic signal at Thirty-sixth Street. He heard a crash, and when the signal changed he pulled across the street, stopped, and parked the car which was headed west on Leavenworth Street. They saw a man cross Thirty-sixth Street in front of a car going north which had stopped and its brakes screeched. This man was coming from between two houses, and was running south. The boys yelled at him, and he turned around and ran west. The boys gave chase, ran across a vacant lot at the corner of Thirty-seventh and Leavenworth Streets, and caught him in the front yard of a house. The boy in the lead pushed him and he went down on his face and stayed there. As this boy testified: "Well, I grabbed ahold of him and just gave him a push forward • • • and he was so tired that he went forward and layed down. He just stayed there." Officer Reese came up and took the man into custody.

The defendant's testimony was to the effect that he borrowed a 1942 Ford car from his friend Bud Tyrell who was a bartender at the Seven Seas cocktail lounge located at 1510 Harney Street. His reason for borrowing the car was to haul materials to a house he was building

at Seventy-sixth and Cass Streets in Omaha upon which he was doing most of the work. He had no car of his own at the time. The car was in poor mechanical condition. At about 9:30 p.m., on May 29th, the defendant drove this car and parked it in the vicinity of the Seven Seas cocktail lounge. He went into the cocktail lounge and talked to people therein who appeared as witnesses in his behalf and testified to seeing him there. The defendant stayed in the cocktail lounge until about 1:10 of 1:15 a.m., May 30th, when he started home. He had difficulty getting the car started. He lived at 827 South Twenty-ninth Street, half a block south of Twenty-ninth and Leavenworth Streets. He was proceeding on Leavenworth Street to the Motor Inn garage located on Turner Park Boulevard, to get his car fixed. This garage was closed. He then thought of the Blackstone garage, as he worked at the Blackstone Hotel as an upholsterer. From the evidence it appears the Blackstone garage is used for storage for General Motors products, and apparently is not the type of garage where the defendant could have had his car fixed. He turned right after he got to the top of the hill, and the motor of the car sputtered and died. He was required to stop the car at Thirty-fifth Avenue and Jones Street. He was unable to get the car started, so he parked it along the east curb of Thirty-fifth Avenue, the same street on which the Perelman store is located. He tried to pry the gears so they would mesh. He used a small bar, the one he had when he was apprehended. He then went on foot south on the east side of Thirty-fifth Avenue to Leavenworth Street. He thought the Cherry Garden garage might be open as it had been an all-night garage. He crossed Leav-

enworth Street on Thirty-fifth Avenue and went west on Leavenvorth Street for two blocks. The garage was not open. He then cut across Thirty-seventh Street from the south to the north side of Leavenworth Street intending to go back to the car. He had on his person $400 and the pinch bar with which he tried to start the car. He walked from Thirty-seventh and Leavenworth Streets eastward on the north side of Leavenworth Street. When he was in front of the first house west of Thirty-sixth Street, about a block from Perelman's store, he heard brakes screeching and saw a man run across a lot and another man stop practically in front of a car, but kept going. There was another car parked approximately in front of a vacant lot about 20 feet ahead of him, headed west. Three men got out of this car, and the defendant ran. He denied that he ran between two houses or across the street in front of any car. He testified that he thought these men were after him and he started to go into a house but was unable to do this as the house was dark. He ran in front of other houses. At the end of the block he ran northwest across a lot up to a house that had a light burning and went into the front yard. This was described as the first house north of Leavenworth Street, facing west on Thirty-seventh Street. He was overtaken, grabbed, turned around, struck in the stomach, and pushed, falling face downward. He could not get up. These men were standing around him. In a couple of minues Officer Reese came up, put his foot on the defendant's back, kicked him hard on the left side, used language which the defendant said he could not repeat, and old him to stand up. The officer grabbed him by the soulders and under the arms and pulled him up. He

was not able to stand up. He was taken into custody, put in a police car, taken to the police station, and booked for the Perelman burglary. He denied that he committed the burglary, was in the grocery store, fled from the store, or had anything to do with the crime charged. He admitted the ownership of the tools found in his car and introduced into evidence as exhibits.

The applicable rule is: "The credibility of witnesses and the weight of their testimony are for the jury to determine in a criminal case, and the conclusion of the jury cannot be disturbed unless it is clearly wrong." Fisher v. State, 154 Neb. 166, 47 N. W. 2d 349. See, also, Hoffman v. State, 160 Neb. 375, 70 N. W. 2d 314.

The trial court properly denied the motion of defendant to dismiss the case on the ground of the insufficiency of evidence.

The defendant contends the trial court erred in admitting in evidence, over the defendant's objections, Exhibits Nos. 7 through 12, and each of such exhibits. The exhibits admitted in evidence consisted of a small hammer, a sledge hammer, a large crowbar, two chisels, and a small crowbar. These tools were found loose in the trunk of the car, together with a box of other tools which were not offered in evidence. However, all the tools were admitted to be the property of the defendant which he was using in the building of a house. The car, which the defendant had borrowed and of which he had possession on May 30, 1953, at the time of the commission of the burglary, had the ignition keys in it and was parked across the street a short distance from the Perelman store and north of the window that had been entered on the

east side of the building. The State's evidence places the defendant inside of the Perelman grocery store. The evidence shows that the east window through which entrance had been gained showed indentations that could have been made by a pinch bar, and that the defendant at the time he was apprehended had a pinch bar in his possession. Two police officers testified that tools such as these exhibits are commonly used in burglaries.

In Phillips v. State, 157 Neb. 419, 59 N. W. 2d 598, the court said: "Where the evidence shows that a defendant was in the vicinity at the time a burglary was committed with the aid of burglarious tools, such possession may be admitted to show that defendant had the means to commit the offense in the manner that it was committed. It is a circumstance which the jury may consider."

There are cases too numerous to mention holding that where an accused is identified as having been at or near the scene of a crime about the time of its commission evidence showing that he owned, possessed, or had access to any articles with which the crime was or might have been committed is competent. See, State v. Montgomery, 175 Kan. 176, 261 P. 2d 1009; State v. Wayne, 62 Kan. 636, 64 P. 69; Commonwealth v. Williams, 56 Mass. 582; People v. Clinton, 78 Cal. App. 451, 248 P. 929; State v. Campbell, 7 N. D. 58, 72 N. W. 935; 22 C. J. S., Criminal Law, s. 611, p. 931, s. 712, p. 1207; 20 Am. Jur., Evidence, s. 246, p. 239, s. 273, p. 260, s. 401, p. 361; Annotation, 143 A. L. R. 1199.

We find no error prejudicial to the defendant under the circumstances here existing.

For the reasons given in this opinion, the judgment of the district court should be and is affirmed.

AFFIRMED.

The State of Nebraska, ss.

I, George H. Turner, Clerk of the Supreme Court of the State of Nebraska, do hereby certify that I have compared the foregoing copy of an opinion filed by said Court on the 28th day of October, 1955, with the original on file in my office and that the same is a correct transcript thereof, and of the whole of said original.

In Testimony Whereof, I have hereunto set my hand and caused to be affixed the Seal of said Court, at the City of Lincoln, this 28th day of October, 1955.

GEO. H. TURNER,
Clerk.

(Seal)

56-375

No. 33733

Supreme Court
STATE OF NEBRASKA

LIAKAS v. STATE

Certified Copy of Opinion

Filed in District Court, Douglas County, Nebraska
Oct. 31, 1955

Sidney J. Gottneid, Clerk